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No. 87-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SOUTH CENTRAL UNITED FOOD & COMMERCIAL WORKERS UNIONS AND EMPLOYERS HEALTH & WELFARE TRUST, and RAY B. WOOSTER,

Petitioners,

vs.

C & G MARKETS, INC. and DONALD L. CHILDRESS,

Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

JEFFREY P. CLARK
(Counsel of Record)
DONALD J. CHRISTL
R. TIMOTHY MUTH
REINHART, BOERNER, VAN DEUREN, NORRIS & RIESELBACH, S.C.
111 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
414-271-1190

CHAS. P. YOUNG COMPANY

QUESTION PRESENTED

Does ERISA or federal common law grant an employer an implied right of action against an employee benefit plan for the return of mistaken contributions when the plan relied on those contributions in extending benefits?

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Petitioners South Central United Food & Commercial Workers Unions and Employers Health & Welfare Trust and Ray B. Wooster, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered on January 26, 1988.

PARTIES TO THE PROCEEDINGS

There were no parties to the proceedings in the United States Court of Appeals for the Fifth Circuit other than those set forth in the caption of the case before this Court.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 836 F.2d 221 and appears on page A-1 of the Appendix. The unpublished decision of the United States District Court for the Southern District of Texas appears at page B-1 of the Appendix.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered final judgment on January 26, 1988, and petitioners filed this petition for certiorari within 90 days of that date. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 403(c) of the Employee Retirement Income Security Act of 1974 provides in pertinent part:

> (c)(1) Except as provided in paragraph 2 . . . the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying the reasonable expenses of administering the plan.
>
> (2)(A) In the case of a contribution . . . (ii) made by an employer to a multiemployer plan by a mistake of fact or law . . . paragraph 1 shall not prohibit the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake.

STATEMENT OF THE CASE

These proceedings began as an action by petitioner South Central United Food & Commercial Workers Unions and Employers Health & Welfare Trust ("South Central") to collect delinquent contributions from respondent C & G

Markets, Inc. ("C & G"). During the course of these proceedings, C & G counterclaimed for the return of contributions paid for employees on whose behalf C & G allegedly had no obligation to contribute. Both the trial court and the Fifth Circuit held that C & G enjoyed a right of action supporting the counterclaim. This petition addresses the existence of such a right of action.

South Central, a multiemployer employee benefit plan as defined by section 3(3) of the Employer Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(3), is administered by a board of trustees composed equally of trustees representing employers and labor organizations.

C & G was a Texas corporation until its dissolution on April 4, 1984. Until that time, C & G was an employer as defined by ERISA section 3(5), 29 U.S.C. § 1002(5). Donald L. Childress was the president and sole shareholder of C & G. There has been no dispute that, pursuant to Texas law, he is responsible for any post-dissolution debts of C & G.

Effective June 1, 1980, C & G entered a collective bargaining agreement with the United Food & Commercial Workers Union Local No. 455 requiring C & G's contributions to South Central for its employees. As is typical, C & G was responsible for calculating and paying its own contributions, subject to periodic audits by South Central. South Central provided health and welfare benefits to all C & G employees on whose behalf C & G contributed.

During 1982, South Central's audit of C & G's contributions uncovered a delinquency totaling $37,812.31 with respect to non-probationary employees and $12,559.39 for probationary employees.

C & G denied that the collective bargaining agreement obligated it to contribute on behalf of probationary employees. When South Central sued C & G for delinquent contributions pursuant to ERISA section 502(g), 29 U.S.C. § 1132(g), C & G counterclaimed for a return of contribu-

tions it had previously made on behalf of probationary employees, claiming that such contributions were made by mistake.

The District Court agreed with C & G's contention that probationary employees were not covered by the collective bargaining agreement. Further, it found that contributions for those employees were made by mistake of law or fact. Without citing statutory or case law, the District Court permitted C & G to set off the amounts of contributions for probationary employees against amounts due South Central—all over South Central's timely argument that, under ERISA or any other law, C & G enjoyed no right of action to obtain such a set-off.

On appeal, the Fifth Circuit acknowledged that this issue has already split the Circuits. The Fifth Circuit then stated that it would find a right of action only in the circumstance of a counterclaim against a plan. Appraising C & G's right of action, the Fifth Circuit noted the three separate camps that other Circuits have joined on the issue of an employer's implied right of action to recover mistaken contributions. The Court proceeded to state:

> The first [possible situation] involves a direct suit by an employer against a plan. If this were the case presented, we would follow the Eleventh and Third Circuits in finding no right of action. Here, however, the original action was brought by the plan trustee against the employer. C & G simply counterclaimed for overpayment. In this limited situation, we hold that there is a right to offset mistakenly overpaid contributions against a delinquency owed. We wish to make it absolutely clear that we are not establishing any affirmative right of action in favor of the employer under ERISA. We are simply applying ERISA to permit a refund of mistakenly overpaid contributions.

836 F.2d at 225. The Court thus concluded that the procedural fact that C & G's claim was a counterclaim, as opposed

to a direct action, enabled C & G to obtain a credit for mistaken contributions.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CREATES A FOUR-WAY SPLIT AMONG THE COURTS OF APPEALS INVOLVING QUESTIONS OF STATUTORY CONSTRUCTION AND FEDERAL COMMON LAW NOT PREVIOUSLY DECIDED BY THIS COURT.

The issue decided by the Fifth Circuit has never been decided by this Court and is of great national importance because it has been the subject of a four-way split of the Circuits. It deals with a fundamental issue in the relationship of thousands of employers and benefit plans involving millions of workers, and it raises serious questions regarding the separation of powers between Congress and the federal judiciary.

The Fifth Circuit's decision below widens an already dramatic split among the Circuits on this question of an employer's implied right of action to recover mistakenly paid contributions under ERISA section 403(c)(2). After the *C&G Markets* decision below, the Circuits are divided into four distinct camps on this single question of statutory construction. The various positions, and the Courts of Appeals taking them, are as follows:

Implied Right of Action. The Ninth Circuit squarely held that an employer has an implied right of action under ERISA section 403(c)(2) to recover mistakenly paid contributions. *Award Service, Inc.* v. *Northern California Retail Clerks Unions & Food Employers Joint Pension Trust Fund*, 763 F.2d 1066, 1068-69 (9th Cir. 1985), *cert. denied*, 474 U.S. 1081 (1986).[1]

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[1] The Northern District of Georgia preceded the Ninth Circuit in reaching this result, *Ethridge* v. *Masonry Contractors,*

(footnote continued on next page)

No Implied Right of Action. Just as decisively, the Eleventh Circuit reached the conclusion, directly contrary to the Ninth Circuit's view, that an employer has no implied right of action to recover mistakenly paid contributions under ERISA section 403(c)(2). *Dime Coal Co.* v. *Combs*, 796 F.2d 394, 396-99 (11th Cir. 1986). The Third Circuit has affirmed a Pennsylvania district court that held the same. *Crown Cork & Seal Co.* v. *Teamsters Pension Fund*, 549 F. Supp. 307, 312 (E.D. Pa. 1982), *aff'd*, 720 F.2d 661 (3d Cir. 1983).

No Implied Right of Action, But Federal Common Law Right to Restitution. The Sixth Circuit agreed that Congress did not create an implicit right of action for employers under section 403(c)(2), but nevertheless found such a right of action under the federal common law of restitution. *Whitworth Bros. Storage Co.* v. *Central States, Southeast and Southwest Areas Pension Fund*, 794 F.2d 221, 233-36 (6th Cir. 1986), *cert. denied*, 107 S.Ct. 645 (1986). The District of Delaware reached that conclusion one year earlier. *Airco Industrial Gases* v. *Teamsters Health & Welfare Pension Fund*, 618 F. Supp. 943, 948-50 (D. Del. 1985).[2]

Employer Has Implied Right of Action, But Only When Asserting Counterclaim. This is the Fifth Circuit's holding below. In its decision, the Fifth Circuit noted that it would

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(footnote continued from preceding page)

Inc., 536 F. Supp. 365, 368 (N.D. Ga. 1982), but that decision has now been effectively overruled by the Eleventh Circuit's opinion in *Dime Coal Company* v. *Combs*, 796 F.2d 394 (11th Cir. 1986).

[2]Two other district courts have erroneously assumed an employer's right of action under section 403(c)(2), without explicitly confronting the question. *See Dumac Forestry Services, Inc.* v. *I.B.E.W.*, 637 F. Supp. 529, 534 (N.D.N.Y. 1986) *aff'd in part and rev'd in part*, 814 F.2d 79 (2d Cir. 1987); *Service Employees International Union Local 82 Labor-Management Trust Fund* v. *Baucom Janitorial Service, Inc.*, 504 F. Supp. 197, 198 (D.D.C. 1980).

follow the Eleventh Circuit's *Dime Coal* opinion if the employer were the plaintiff, rather than the counterclaiming defendant. The Fifth Circuit called this a "limited" right of action, and further expressed its desire "to make it absolutely clear that we are not establishing any affirmative right of action in favor of the employer under ERISA." *South Central United Food & Commercial Workers Unions and Employers Health & Welfare Trust* v. *C & G Markets, Inc.*, 836 F.2d 221, 225 (5th Cir. 1988).

The five Circuits that have considered Congress' intent to provide a judicial remedy for employers under section 403(c)(2) have now reached four distinct and logically irreconcilable conclusions. Necessarily, at least three of these Circuits have wrongly interpreted Congressional intent on an important point: an employer's right to substitute civil litigation in federal court for the express remedy before the plan's board of trustees granted by ERISA section 403(c)(2). After twice denying certiorari on that question, this Court should now set the situation right.

II.

THE DECISION BELOW BLURS THE RESPECTIVE POWERS OF THE LEGISLATIVE AND JUDICIAL BRANCHES BY CREATING A PRIVATE RIGHT OF ACTION WHERE CONGRESS DID NOT, AND THUS DIRECTLY CONTRADICTS THIS COURT'S DECISIONS CONCERNING IMPLIED RIGHTS OF ACTION.

A. Section 403(c)(2) Was Not Intended To Provide Employers A Judicial Remedy.

On its face, section 403(c)(2) provides no cause of action for an employer, or for any other party. Employers are excluded as well from ERISA's general enforcement provision, section 502, which expressly creates rights of action for participants, beneficiaries, fiduciaries and the Secretary of Labor. 29 U.S.C. § 1132. Nowhere, then, did Congress expressly provide a cause of action for employers under

section 403(c)(2). Accordingly, if employers have a cause of action under this section, it must be implied from the statute's terms.

This Court has made clear that Congressional intent alone determines the existence of implied rights of action. *Cannon* v. *University of Chicago,* 441 U.S. 677, 730-49 (1979) (Powell, J., dissenting); *California* v. *Sierra Club*, 451 U.S. 287, 301-03 (1981) (Rehnquist, J., concurring); *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 453 U.S. 1, 13 (1981); *Daily Income Fund, Inc.* v. *Fox*, 464 U.S. 523, 534-36 (1984).

Measured by that standard, section 403(c)(2) of ERISA reveals no Congressional intent to provide employers a judicial remedy. That section has always defined what *trustees* may do, consistent with their fiduciary duties, not what employers (and judges) may force them to do. The only significant legislative history under section 403(c)(2), which came with the Multiemployer Pension Plan Amendments Act of 1980, Pub.L. 96-364, 94 Stat. 1208, corroborates the legislature's preoccupation with *trustees'* powers, not employers' judicial remedies. *See Hearings on the Multiemployer Pension Plan Amendments Act of 1979, H.R. 3904, Before the Committee on Education and Labor, 96th Cong., 1st Sess. 853-54 (1979); Senate Subcomm. on Labor of the Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., Legislative History of the Employee Retirement Income Security Act of 1974*, 4570 (Comm. Print 1976).

This legislative history focuses upon the fiduciary duty of trustees to the plan, its participants and beneficiaries. No fiduciary duty runs to the employer. 29 U.S.C. § 1103. Congress had no explicit or implicit intention to give employers the right to force otherwise permissive returns of contributions made by unilateral mistake of the employers themselves.

The complexity and completeness of ERISA help compel the conclusion that Congress intended no remedies other

than those explicitly set forth. This Court has previously struck down claims of implied remedies or causes of action under other provisions of ERISA. In *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134 (1985), the Court rejected the contention that extra-contractual relief was available under ERISA. The Court pointed out:

> The six carefully-integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly. The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated and interdependent remedial scheme, which is in turn part of a "comprehensive and reticulated statute."

Id. at 146 (emphasis in original).

In *Laborers Health and Welfare Trust for Northern California* v. *Advanced Lightweight Concrete Co.*, 108 S.Ct. 830 (1988), the Court declined to recognize a right to sue under ERISA or other labor laws for *post*-contract contributions to a plan. The Court noted:

> The Legislative history [of sections 515 and 502(g)(2) of ERISA] contains no mention of the employer's statutory duty to make postcontract contributions while negotiations for a new contract are being conducted. Thus, both the text and the legislative history of §§ 515 and 502(g)(2) provide firm support for the . . . conclusion that this remedy is limited to the collection of "promised contributions" and does not confer jurisdiction on district courts to determine whether an employer's unilateral decision to refuse to make postcontract contributions constitutes a violation of the NLRA.

Id. at 835-36.

These recent decisions by the Court offer support for South Central's contention that there is no express or implied right under ERISA for employers to recover paid-in contributions. Moreover, Congress specifically created a non-judicial remedy in section 403(c)(2)—which virtually extinguishes the possibility that a judicial remedy was forgotten. As amended, section 403(c)(2)(A)(ii) is limited to multiemployer plans, such as South Central, which are required to maintain a Board of Trustees composed equally of employer representatives and representatives of labor. 29 U.S.C. § 186(c)(5). An employer who has made legitimately mistaken contributions can always expect that at least one-half of the votes on the Board of Trustees will likely support return of mistaken contributions, if that can be reconciled with their fiduciary duties.

The decision below explicitly recognizes that no implied cause of action exists. 836 F.2d at 225. Had it stopped there, the decision would have been in accord with applicable Supreme Court jurisprudence. The Fifth Circuit reversed directions, however, and permitted employers to assert such causes of action as counterclaims in delinquent contribution actions.

B. Because An Employer Has No Independent Right Of Action For Return Of Contributions, The Employer Cannot Assert Such A Right In A Counterclaim.

The decision below allows employers who are delinquent in contributions to an employee benefit plan, to assert a counterclaim or setoff for previous overpayments allegedly made by mistake. The decision below establishes this right of offset while at the same time acknowledging that the employer has no implied right of action for return of mistaken contributions.

Although South Central is aware of no decision of this Court deciding the question, it is a generally-accepted rule of law that a defendant may not raise a counterclaim or setoff which could not have been the subject of an independ-

ent action instituted by that defendant. *See Erie Lackawanna Railway Co.* v. *United States*, 439 F.2d 194, 200 (Ct. Cl. 1971) ("A party may generally assert a counterclaim if he has a legally subsisting cause of action upon which he could have maintained an independent suit."); *Flying Tiger Line, Inc.* v. *United States*, 170 F. Supp. 422, 425 (Ct. Cl. 1959)(same); *Weller* v. *Putnam*, 194 Neb. 692, 171 N.W.2d 767 (1969)(same); *Sparkman & McLean Income Fund* v. *Wald*, 10 Wash. App. 765, 520 P.2d 173 (1974)(same).

The Fifth Circuit fails to realize that the practical consequences of its decision are exactly the same as allowing a direct cause of action. Presumably, most employers who have made overpayments continue to be subject to contribution obligations extending into the future. If those employers seek a refund of overpayments, the decision below invites them simply to withhold mandatory contributions, wait until the plan sues them for the delinquency and then raise the overpayments as a counterclaim. Thus, for the employer, the refund of overpayments is readily obtained.

By creating a cause of action assertable only as a counterclaim in delinquent contribution actions, the decision below thwarts the Congressional intent to streamline delinquent contribution actions with a minimum amount of costs to employee benefit plans. Part of the legislative history of MPPAA, as this Court recently noted, illustrates the problems Congress sought to avoid:

> "Delinquencies of employers in making required contributions are a serious problem for most multiemployer plans. Failure of employers to make promised contributions in a timely fashion imposes a variety of costs on plans."
>
> * * *
>
> "[Furthermore,] recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. Some sim-

> ple actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions. This should not be the case. Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously."

Laborers Health and Welfare Trust Fund for California v. *Advanced Lightweight Conrete Co., supra*, 108 S.Ct. at 834-35 nn.12 & 14 (quoting *Staff of Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., S. 1086, the Multiemployer Pension Plan Amendments of 1980: Summary and Analysis of Considerations, 43-44* (Comm. Print 1980).

Directly contrary to Congress' wishes, the decision below encourages employers to stall contributions whenever there is a dispute regarding overpayments. If the delinquent employer provokes the plan to sue, the employer spontaneously acquires a right of action with which to protract the plan's collection action. This Court should issue a writ of certiorari to review and correct the decision below.

CONCLUSION

This petition should be granted to resolve the four-way split in the circuits created by the decision below and to correct that decision's failure to follow the dictates of this Court concerning implied rights of action.

Respectfully submitted,

REINHART, BOERNER,
VAN DEUREN, NORRIS &
RIESELBACH, S.C.
111 East Wisconsin Avenue
Suite 1800
Milwaukee, WI 53202
414-271-1190

JEFFREY P. CLARK
DONALD J. CHRISTL
R. TIMOTHY MUTH
Attorneys for Petitioners

APPENDIX A

SOUTH CENTRAL UNITED FOOD & COMMERCIAL WORKERS UNIONS,
et al., Plaintiffs-Appellants,

v.

C & G MARKETS, INC., et al.,
Defendants-Appellees.

No. 86-2824.

United States Court of Appeals,
Fifth Circuit

January 26, 1988.

Multiemployer plan trust brought action against employer to recover delinquencies, and employer counterclaimed for mistaken overpayments. The United States District Court for the Southern District of Texas, Charles B. Smith, United States Magistrate, offset overpayments against delinquencies, and appeals were taken. The Court of Appeals, Brown, Circuit Judge, held that: (1) employer had right to offset mistakenly overpaid contributions against delinquency; (2) offset of mistaken contributions prior to calculation of interest and penalties was improper, and (3) denial of auditor's fees without explanation was error.

Affirmed in part, reversed in part, and remanded.

1. Pensions ⇐104

ERISA does not provide private right of action to employer seeking to recover mistakenly overpaid contributions under multiemployer plan.

2. Pensions ⊂=104

Employer has right to offset mistakenly overpaid contribution against delinquency owed under multiemployer plan.

3. Interest ⊂=31, 39(1), 41

Pensions ⊂=104

When offsetting employer's mistaken overpayments to multiemployer plan trust against delinquency owed, trust was entitled to 20% interest provided for in plan from date of delinquency until date it was paid, and employer was entitled to simple interest, at legal rate, on overpaid contributions from date of overpayment until date of setoff; moreover, defendant was entitled to credit for benefits which were not required under plan, but which were paid on behalf of employees for whom contributions were mistakenly received.

4. Interest ⊂=36(1)

Multiemployer plan requiring imposition of 20% interest on employer delinquencies was properly interpreted as requiring calculation of simple interest at 20%.

5. Pensions ⊂=104

Remand was required in multiemployer plan trust's action against employer to recover delinquencies where trial court's conclusory justification of attorney fees was insufficient to permit independent analytical review.

6. Pensions ⊂=107

Denial of auditor's fees without explanation was error in multiemployer plan trust's action against employer to recover delinquencies.

Jeffrey P. Clark, Dean A. Strang, Reinhart, Boerner, Van Deuren, Norris & Rieselbach, S.C., Milwaukee, Wis., for plaintiffs-appellants.

Nancy Morrison O'Connor, Houston, Tex., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, BROWN, and JOHNSON, Circuit Judges.

JOHN R. BROWN, Circuit Judge.

C & G Markets, Inc. (C & G) appeals from a judgment holding it liable for a deliquency in contributions made to its employee benefit plan, South Central United Commercial Workers Unions Employers' Health & Welfare Trust (South Central Trust). Against that delinquency, the district court offset mistakenly paid contributions. The offset was calculated prior to the determination of the interest and penalties authorized under ERISA and the Trust Agreement. The court denied auditor's costs, but awarded attorney's fees.

On appeal, the parties raise four issues: whether the district court erred in (i) finding an implied right of action under ERISA, 29 U.S.C. § 1103(c) for an employer seeking to recover mistaken contributions; (ii) offsetting the mistaken contributions prior to the calculation of interest and penalties; (iii) the calculation of interest due; and (iv) its calculation of appropriate costs, including the denial of auditor's fees, and attorney's fees.

We affirm the holding (i) which permitted C & G to recover mistakenly overpaid contributions and offset that amount against payments due. We vacate and remand for (ii and iii) calculation of the offset and interest due. We reverse the holding which (iv) denied auditor's fees and incorrectly determined the attorney's fee. We remand for calculation of an appropriate auditor's fee and a recalculation of the attorney's fee.

How it all Began

Prior to its dissolution on April 24, 1984, C & G was considered an employer as defined by ERISA,[1] and South Central Trust is a multi-employer qualified plan and an "employee benefit plan" as likewise defined by ERISA.[2] The Trust is administered by a Board of Trustees composed equally of trustees representing United Food and Commercial Workers' Union (Union) and trustees representing employers. The South Central Trust Plan provides health and welfare benefits to members of the union for whom contributions are made.

C & G was a party to a collective bargaining agreement with the Union which was effective from June 1, 1980 through May 29, 1983. During that period, C & G consistently contributed to the Plan on behalf of employees during the term of the agreement. In June 1983, the Union was decertified by a vote of the bargaining unit and, as a result, C & G was no longer obligated to make any contributions to the Plan on behalf of its employees.

Under the collective bargaining agreement, C & G was required to make contributions in favor of all employees, both probationary and nonprobationary, into the pension fund established by the Plan. The agreement additionally required contributions into the health and welfare fund on behalf of nonprobationary employees only.

During an audit conducted by South Central Trust's independent auditors in May 1983, it was discovered that C & G had paid $26,649.99 into the health and welfare fund on behalf of probationary employees during 1981-83. Under the collective bargaining agreement, C & G was not obligated to make these contributions. However, after accepting the contributions, South Central Trust extended

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[1] Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002(5).

[2] 29 U.S.C. § 1002(37)(A).

benefits to those probationary employees on whose behalf contributions had mistakenly been made.[3] This same audit also revealed that for the years 1981-83, C & G had underpaid its contribution obligations for non-probationary employees to the pension fund in the amount of $37,812.31.

Interest Becomes of Interest

Under the rules and regulations of the Plan, an employer is liable for interest on unpaid contributions at the rate of 20% per year. The Plan does not indicate whether the interest is simple or compound, or whether it is to be calculated monthly or annually. The Plan further provides that the delinquent employer shall be responsible for the payment of reasonable attorneys' fees, and other costs incurred by the Plan in connection with a lawsuit. The Plan is also entitled to recover liquidated damages equal to the amount of interest due on unpaid contributions. These provisions parallel ERISA § 1132(g).

Litigation Sets In

South Central Trust instituted suit against C & G in 1984 for recovery of contributions allegedly owed by C & G to the Plan. C & G counterclaimed for contributions made by mistake on behalf of the probationary employees. This case was tried before a United States Magistrate sitting pursuant to agreement of the parties.[4]

A second audit[5] was conducted and the court accepted these later findings of the accountants as correct. The court

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[3] The trial court found that the Trust disbursed $1,736.17 to employees who were not members of the collective bargaining unit.

[4] *See* 28 U.S.C. § 636(c); F.R.C.P. 73(a).

[5] The amounts of the delinquency and the overpayment were hotly contested by both sides. During discovery, C & G objected to the original audit. Fearing that the original audit would be objected to at trial on the grounds that the payroll

(footnote continued on next page)

found that C & G was delinquent in the amount of $37,812.31 which should have been paid into the Pension Fund on behalf of non-probationary employees. The court also determined that the collective bargaining agreement imposed no obligations on C & G to make contributions to the Plan on behalf of probationary employees, and contributions on their behalf were made by mistake.

Prior to calculating interest, the court offset the amount of mistaken overpayments against the delinquency. Interest on the balance due was calculated using an annual simple interest rate of 20% from the date of the May 1983 Audit until September 1, 1986, sixteen days before final judgment was entered. Liquidated damages, attorneys' fees of $7,500 and costs in the amount of $6,174.93 were also awarded, but there was no mention made of auditor's costs in the final judgment. The parties appeal directly to this Court.[6]

THE ISSUES

I.

Implied Right of Action to Recover Mistaken Contributions

South Central Trust characterizes the trial court's determination to set-off mistaken contributions against contributions owed as finding an implied right of action for the employer to recover these contributions under ERISA, 29 U.S.C. § 1103(c)(2)(A)(ii). It was not necessary for the trial court to have found an implied right of action because ERISA expressly permits recovery.

(footnote continued from preceding page)

summaries on which the audit was based were inadmissible hearsay. South Central had its auditors reconstruct the audit in its entirety from the original payroll records.

[6] *See* F.R.C.P. 73(c).

Section 1103(c)(2)(A) provides:

In the case of a contribution . . .

> (ii) made by an employer to a multiemployer plan by a mistake of fact or law . . . paragraph (1) shall not prohibit the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake.

This section expressly gives an employer the right to have an overpayment returned, if that overpayment was the result of a mistake of fact or law. It was not necessary for the court to find an implied right of action if C & G came within the ambit of § 1103(c)(2)(A)(ii). There is no violation of ERISA's exclusive benefit rule if mistaken contributions are returned under this section.

The trial court found that C & G timely sought a refund of the contributions overpaid on behalf of probationary employees. Rather than acting on that request, the trustees turned the request over to the Plan's attorneys for resolution. Our review is technically limited to a determination of whether the trustees acted in an arbitrary and capricious fashion in not refunding the amount which C & G overpaid. *Bayles* v. *Central States, Southeast and Southwest Areas Pension Fund*, 602 F.2d 97, 99 (5th Cir.1979). C & G suggests that we follow the Third Circuit in according *de novo* review to the plan administrator's refusal. *See Bruch* v. *Firestone Tire & Rubber*, 828 F.2d 134, 145 (3rd Cir.1987). As there is no reason given for the failure to issue a refund, there is nothing for this Court to review. We must simply apply the law in determining whether C & G was entitled to a refund.

The trial court determined that the collective bargaining agreement did not require contributions on behalf of probationary employees into the health and welfare portion of the Plan, and that contributions made on behalf of these

employees were made by mistake. The parties do not dispute this ruling. The dispute arises over whether the mistaken contributions, in litigation to recover underpaid contributions, can be set-off against the underpaid contributions. This is not a decision within the discretion of the Trustees, but a question of law over which this court has plenary review.

[1] While we tend to agree that ERISA does not provide a private right of action to an employer seeking to recover mistakenly overpaid contributions, we do not feel the need to address an issue which has already split the Circuits.[7] The situation presented here is somewhat different. The question with which we are faced is not whether there is an implied right of action under ERISA, but whether an employer is entitled to a set-off for contributions mistakenly made. The two situations are distinguishable.

[2] The first involves a direct suit by an employer against a plan. If this were the case presented, we would follow the Eleventh and Third Circuits in finding no right of action. Here, however, the original action was brought by the plan trustee against the employer. C & G simply counterclaimed

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[7] The Circuits which have addressed the issue of whether ERISA carries with it an implied right of action for recovery of mistaken contributions have split. *Coal Co.* v. *Combs*, 796 F.2d 394, 396-99 (11th Cir.1986); *Cork & Seal Co.* v. *Teamsters Pension Fund*, 549 F.Supp. 307, 312 (E.D.Pa.1982), *aff'd*, 720 F.2d 661 (3d Cir.1983) (no implied right of action); *Service Inc.* v. *Northern California Retail Clerks Unions & Employers Joint Pension Trust Fund*, 763 F.2d 1066, 1068-69 (9th Cir.1985), *cert. denied*, 474 U.S. 1081, 106 S.Ct. 850, 88 L.Ed.2d 890 (1986); *see also Ethridge* v. *Masonry Contractors, Inc.*, 536 F. Supp. 365, 368 (N.D.Ga. 1982) (ERISA does provide an implied right of action); *Whitworth Bros. Storage Co.* v. *Central States, Southeast and Southwest Areas Pension Fund*, 794 F.2d 221, 233-36 (6th Cir.1986); *see also Airco Industrial Gases* v. *Teamsters Health & Welfare Pension Fund*, 618 F.Supp. 943, 948-50 (D.Del.1985) (common law right of restitution permits an employer to seek recovery in the federal courts).

for overpayment. In this limited situation, we hold that there is a right to offset mistakenly overpaid contributions against a delinquency owed. We wish to make it absolutely clear that we are not establishing any affirmative right of action in favor of the employer under ERISA. We are simply applying ERISA to permit a refund of mistakenly overpaid contributions.

II.

Front-end Offset

[3] South Central Trust asserts that the lower court erred in allowing C & G to offset mistaken payments prior to calculation of interest on the amount ($37,812.31) which was due as unpaid contributions. The argument presented is that, by deducting the overpayments first, the court effectively gave C & G the equivalent of twenty percent (20%) interest on the delinquency to the extent that it was cancelled out by the overpayment.

On the other hand, South Central Trust had full use of the overpaid funds and, theoretically at least, earned interest on that amount from the time of the over-payment until the date the balance was struck. If some sort of front-end offset is not used, South Central Trust will have had the use of the money which was mistakenly overpaid.

Interest on the full delinquent sum ($37,000) is due at the rate of twenty percent (20%) simple interest from the date of the delinquency until the date the delinquent sum is paid. Since the statute authorizes a refund, we fail to see why ordinary principles would not entitle C & G to recover simple interest, at the legal rate, on the overpaid contributions from the date of the overpayment until the date the balance is struck on the offset. In addition, South Central Trust is entitled to full credit for benefits which were not required under the Plan, but which were paid on behalf of

probationary employees for whom contributions were mistakenly received.[8]

III.

Calculation of Interest

The trial court held that interest was to be calculated from the date of the corrected audit. This is contrary to the view of this Court. Although the audit may well have been the impetus necessary to bring the deficiency to light, the preparation of the audit was not the factor which triggered the application of the Plan's provision for calculating interest and statutory penalties. Interest must be calculated from the date of the deficiency until the date the deficiency is paid and we remand for the appropriate calculation.

South Central Trust also objects to the method by which the interest was calculated. The District Court ordered interest calculated "based upon the rate provided under the plan, that is twenty percent (20%) simple interest . . ." The Delinquency Policy of the Plan provides for a late charge against delinquent employers of twenty percent (20%) of the delinquent amount. (Pl. Ex. 9a). The Plan does not indicate whether the interest is to be simple or compounded at specific intervals, only that the charge shall not exceed the maximum permitted by law. Although South Central Trust directs us to § 6622 of the Internal Revenue Code (IRC)[9] as an aid in interpreting the provisions of the Delinquency Policy, we find such recourse unnecessary, and affirm the ruling of the lower court.

ERISA provides for an award of interest in favor of the plan to be calculated according to the rate provided for in the plan. Only if the plan fails to specify an interest rate should the IRC rate be used. 29 U.S.C. § 1132(g)(2).

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[8] *See* n. 3, *supra*.

[9] Section 6622 provides that interest calculated under that section shall be compounded daily.

Because South Central Trust does specify an interest rate in the Delinquency Policy, there is no reason to look to the IRC.

[4] ERISA does not require that interest be compounded. The statute directs courts to the interest provided for by the parties to the agreement. The court could, as it did, determine that from the absence of a contrary directive, the Delinquency Policy provided for simple, not compound, interest. There is no basis for the argument that 20% interest, with no mention of a time period, means 20% interest compounded monthly. We concur in the decision to calculate simple interest at twenty percent.

IV.

Attorney's Fees and Auditor's Costs

[5] South Central Trust requested attorney's fees in the amount of $58,359.21; the court awarded $7,500. The court refused to award fees for time spent on work which the court felt was unnecessary. This conclusory justification is insufficient.

It is the settled law of this circuit that a trial court must use the factors set out in *Johnson* v. *Georgia Highway Express*, 488 F.2d 714 (5th Cir.1974) in calculating an award of attorney's fees. *Abrams* v. *Baylor College of Medicine*, 805 F.2d 528 (5th Cir.1986); *Brantley* v. *Surles*, 804 F.2d 321 (5th Cir.1986). The court completely failed to do so here, and left a record insufficient to permit, as *Johnson* contemplates, an independent analytical review. We must vacate the award of attorney's fees and remand for consideration in light of the *Johnson* factors.

[6] South Central Trust additionally requested recovery of its auditor's fees under ERISA and the earlier decision of this circuit in *Carpenters Amended and Restated Health Benefit Fund* v. *John W. Ryan Construction Co.*, 767 F.2d 1170 (5th Cir.1980). Although the court accepted the findings of the second audit as accurate, and used those figures to

determine the judgment, there was no award of auditor's fees, nor any explanation for the failure to do so. This is clear error and we must remand for an analysis and determination of the auditor's fees consistent with *Carpenters*.

The End of the Tale

The decision of the trial court to offset the overpaid contributions against the delinquency owed was essentially correct and we therefore affirm the judgment in that respect. However, the method by which the offset was calculated was incorrect, and consequently the interest award was also incorrect. We vacate the judgment and remand for a recalculation of the amount due South Central Trust and the interest which will be due thereon.

The trial court denied auditor's fees. These costs are proper elements of damages under the trust agreement ERISA and our previous holding in *Carpenters*. We reverse and remand for calculation of an appropriate auditor's fee. The trial court improperly failed to consider the *Johnson* factors in the calculation of the attorney's fee. We remand for the determination of an appropriate attorney's fee in light of these factors.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

SOUTH CENTRAL UNITED FOOD & COMMERCIAL
WORKERS UNIONS AND
EMPLOYERS HEALTH & WELFARE TRUST, et al.

vs.

C & G MARKETS, INC., et al.

C. A. No. G-84-203

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff, (South Central) is an employee benefit plan as defined by Section 33 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1002(3). South Central is a multiemployer plan and is administered by a board of trustees composed equally of trustees representing labor organizations.

The defendant, C & G Markets, Inc. (C & G), was a Texas Corporation until it was dissolved on April 4, 1984, and was until then an employer as defined by ERISA Section 3(5), 29 U.S.C. § 1002(5). The defendant Donald L. Childress ("Childress") was the President and sole shareholder of C & G. It was stipulated that Childress was responsible for any debt C & G became liable to pay in this action. In March of 1983, Childress suffered a massive heart attack

and essentially withdrew from active participation in this controversy.

C & G was a party to a collective bargaining agreement with United Food and Commercial Workers ("UFCW") Local Union No. 455, effective June 1, 1980 through May 29, 1983.

The central dispute in this case arose over an interpretation of Article 18 of such agreement which provides as follows:

Section 18.01

> The employer agrees to contribute to the established South Central Division Retail Clerks Union and Employers Health and Welfare Trust for all hours paid each month up to 40 hours a week for all employees in the bargaining unit herein described. Such contributions to be used to provide health and welfare benefits as determined by the Trustees as provided in the South Central Division Retail Clerks Union and Employers Health and Welfare Trust Agreement.

Article 19 provided for payments to the pension plan as follows:

Section 19.01

> The employer agrees to contribute to a jointly administered Trust Fund, known as the Retail Clerks Unions and Employers Pension Fund for all hours paid, up to forty (40) hours a week, for all employees in the bargaining unit herein described *and for probationary employees.* (Emphasis Supplied). Hours paid shall include paid hours of vacation, holidays and other hours of leave paid for by the Employer.

Plaintiff contended that C & G Markets was obligated to pay into the Health and Welfare Plan for all hours paid each month for the "probationary employees".

I find that under the contract the employer *was not* obligated to pay for hours worked by probationary employees into the Health and Welfare Plan. Payments to the Pension Fund are expressly required for Probationary employees under Section 19.01. The distinction is material and clearly distinguishes that payments for probationary employees were not agreed to under Section 18.01.

The testimony revealed that the auditing firm of Wade Stevenson and Company was engaged by South Central to audit C & G to detemine whether C & G was delinquent in making contributions to South Central and the amount of any delinquency. The audit of May 27, 1983, Plaintiff's Exhibit 1-B, disclosed that from April 1, 1981 to March 31, 1983, C & G paid $26,649.99 in contributions to South Central for probationary employees. A supplemental audit report dated March 10, 1986, Plaintiff's Exhibit 1-D, disclosed that for November and December of 1982 an additional $750.11 dollars for probationary employees was paid by C & G.

C & G contended that this amount was paid by mistake by an outside agency retained by C & G Markets to calculate contributions and that upon Donald L. Childress discovering such mistake in the audit of May 27, 1983, he instructed that no further payment should be made. He made known to Wade Stevenson and Company that C & G Markets was entitled to a refund for the amount paid by mistake. No formal claim was filed by C & G Market in connection with this refund claim. South Central, through it's administrator Ray B. Wooster, did not present the refund claim to the Trustees of the Welfare Plan but by his testimony turned the entire matter over to the attorneys for the Plan to file

suit for any delinquencies including additional delinquent health and welfare contributions due for probationary employees in the amount of $12,070.22.

I find that C & G did pay these sums under a mistake of fact and law. I further find that Childress did request a refund and that the Plan did not present such a request to its Trustee's as the Plan Administrator was of the opinion that no refund was called for. Therefore, the failure of the Plan Trustees to act on the requested refund does not preclude C & G from claiming such refund as an offset to other claims.

I find as a matter of fact that C & G Market does not owe the claimed $12,070.22 of unpaid Probationary contributions and in fact is entitled to a refund of the amount paid $27,400.10 as the contract did not provide for such payments and C & G is not estopped to claim and receive such a refund.

In addition to the question concerning probationary employees, Plantiff's Exhibit 1-B and Plaintiff's Exhibit 1-C, disclosed an accumulated contribution delinquency to South Central in the amount of $37,812.31. This amount did not include the disputed delinquency for hours worked probationary employees of $12,070.22 which if included would have brought the total claimed contribution delinquency to $50,371.70. This plus amounts for November and December, 1983 referred to hereinafter was the maximum amount that the South Central could have recovered.

In the interim period between the first phase of the trial on the liability question for probationary contributions and the second phase concerning the remaining delinquency, Mr. Hutto of Wade Stevenson was again engaged by plaintiff to prepare a presentation of the amounts in controversy, including non paid claims for probationary workers as well as underpayments for covered workers. He specifically

addressed claims for under and over payments claimed for certain workers who were questionable as covered workers because of their working duties and classification as employees, i.e. Urbani, Holubek and Walker.

The accounting of Wade Stevenson, testified to by Mr. Hutto revealed the following:

TOTAL AMOUNT CLAIMED		$50,371.70
Disputed Probationary Contributions:		
Unpaid Amount for Probationary employees	$ (12,559,39)	
"Mistakenly Paid" and claimed as a refund	(26,649.99)	
		(39,209.38)
TOTAL		$11,162.32
Undisputed Overpayments By C & G		(1,936.46)
TOTAL CLAIM Excluding Probationary Claim		$ 9,225.86
Errors Found Prior to Trial		
Human Error	(600.71)	
Difference between Pension & S. Central Contribution Reports	(248.17)	
Credit C & G		(848.88)
		$ 8,376.98
Refunded Claim for Holubek	(1,172.61)	
Refunded Claim for Walker	(563.56)	
(Payments made for above when not part of bargaining group)		(1,736.17)
NET DUE PLAN:		$ 6,640.81

I find that the testimony above referred to of Mr. Hutto is the most credible and I adopt those amounts as findings of facts in connection with the claim made. I find that C & G

Markets would not be entitled to any refund for contributions made for Urbani. As to the claim of offset for contributions on probationary employees of $26,649.99 and the additional amount of $750.11 for November and December 1982, I find they are not barred by the statute of limitations under ERISA of six (6) months or the doctorine of laches and should be and are allowed. I further find that the net recovery of $6,640.81 referred to by Mr. Hutto should be supplemented by the amount of $848.27 testified to by Mr. Hutto as being due for the months of November and December of 1982 for a total amount of $7,489.08. I find that the allowance of the credits or setoffs to the defendants as here awarded will not result in the undermining of the financial stability of the plan. It is observed that the plan has had the use of the amounts since their payment.

Interest on the unpaid contributions is to be computed based upon the rate provided under the plan, that is twenty percent (20%) simple interest, from the date of May 27, 1983 to September 1, 1986. Liquidated damages on the unpaid contributions is awarded in an amount equal to such interest.

Both plaintiff and defendants attorneys, introduced evidence concerning their attorneys fees and request for payment thereof. The Plaintiff introduced testimony that indicated to the Court that a fee in excess of $100,000.00 was in order and should be awarded. The defendant presented evidence that a fee in excess of $23,000.00 should be awarded to him. I am aware and carefully studied the cited law and cases under which the claims for attorneys fees have been made. I recognize that the purpose of such law was and is to enforce collection of delinquent payments. The problem presented is that the exact amount of the delinquency was not clearly stated nor proven *until* the day of trial when Mr. Hutto gave his final figures in testimony. It is apparent that a great deal of time was expended by both sides on what should have been and is agreed to by them, a question of law which could have been decided by a

summary judgment very early in the case, and the remaining accounting features submitted to arbitration. Under the facts of this case, the Court cannot award fees for work it feels was unnecessary and therefore allows a fee in the amount of $7,500.00 to plaintiff's attorneys and denies any fee for the defendant.

Accordingly, it is ORDERED, ADJUDGED and DECREED that the Plaintiff's are entitled to a net recovery of $7,489.08, plus interest at the rate of 20% simple interest from the date of delinquency, plus liquidated damages on the unpaid contributions an amount equal to the interest plus attorneys fees in the amount of $7,500.00 with no interest.

CHAS. B. SMITH

Chas. B. Smith
United States Magistrate